Local 79, Construction and General Building Laborers, Liuna *and* DNA Contracting, LLC and Local 1, New York, International Union of Bricklayers and Allied Craftsmen. Case 2–CD–1053

April 25, 2003

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The charge in this Section 10(k) proceeding was filed on May 28, 2002,[1] by DNA Contracting, LLC (the Employer or DNA). The charge alleges that Local 79, Construction and General Building Laborers, LIUNA (Local 79) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees that Local 79 represents rather than to employees represented by Local 1, New York, International Union of Bricklayers and Allied Craftsmen (Local 1 or Bricklayers). The hearing was held on July 8 before Hearing Officer Wilfredo Perez.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

DNA is a New Jersey Limited Liability Corporation with a warehouse and principal place of business in Newark, New Jersey. It provides waterproofing, building facade restoration, and related services for commercial customers in New York, New York. Annually, in the course and conduct of its business operations, DNA provides services valued in excess of $1 million to its customers in New York, New York, to customers directly engaged in interstate commerce. We find that DNA is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At the hearing, the parties stipulated, and we find, that Local 1 and Local 79 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The 761 Seventh Avenue Condominium Association owns a 21-story residential and commercial building at 150 West 51st Street, New York, New York.[2] The building is managed by a Master Board, which oversees the building's operation. Goodstein Management Corporation is the building's property manager. Michael Tajeri is Goodstein's executive agent managing the building.

In May, the Master Board and DNA entered into a contract for the performance of exterior restoration and renovation work. Goodstein oversees this project and acts as the construction manager for the Master Board. DNA has a collective-bargaining relationship with Local 1 through a master labor agreement between Local 1 and the Building Restoration Contractors Association, of which DNA is a member. Frank Bitonti is DNA's vice president and principal. DNA began mobilizing at the building in mid-May.

On May 24, Local 79 Business Agents John Mastrione and Kenny Robinson approached Tajeri at the jobsite and presented Tajeri with their business cards. The two informed Tajeri that the job was not a union job. He was told by one of them, "My friend, this is going to be a problem. There's going to be a problem for your building. There's going to be picketing." When Tajeri asked what this had to do with him, they said that they had been calling DNA to sign a contract with them, and that DNA refused to answer their call. At the end of the conversation, the business agents told Tajeri that they were "going to give [him] 48 hours to get DNA to sign a contract with Local 79 before they start their activities and organization in front of the building." [3]

On May 28, Mastrione and Robinson again spoke to Tajeri in the street near the building. They said that they hadn't heard anything about any contract having been signed by DNA, and warned that their offices were working on starting the pickets in front of the building. On May 30, the Local 79 business agents and others showed up with a 12- to 14-foot tall inflatable rat.[4] They also screamed, blew whistles, and honked the horns of sports utility vehicles in front of the building and in the street. These picketing and protest activities continued until mid-June. The inflatable rat was displayed at the building on at least eight occasions.

After June 3, Tajeri shut down the 150 West 51st Street project because of the activities of Local 79. On June 7, DNA Vice President Bitonti spoke with Mastrione by telephone, and they discussed the possibility that DNA might hire a couple of Local 79's laborers. Mastrione refused, stating that he wanted DNA to sign an agreement. On June 10, the two met at the offices of Lo-

[1] All dates herein refer to 2002 unless otherwise specified.

[2] The following factual account is based on the uncontradicted testimony of the Employer's witnesses.

[3] This was not the first such incident involving these parties. In 1998, Local 79 claimed work being performed by members of Local 1 for DNA. An unfair labor practice charge was filed, but a subsequent disclaimer by Local 79 led to a non-Board settlement.

[4] In the building trades, a "rat" sometimes refers to a nonunion contractor. See, e.g., *Sheet Metal Workers Local 19* (*Delcard Associates*), 316 NLRB 426, 437–438 (1995).

cal 79. Bitonti explained that he did not feel that Local 79 was appropriate for the work. He expressed his concerns about breaking the contract with Local 1 and cited some of the advantages of Local 1. Mastrione responded that Local 79 had training schools, people in school and training, and people who could hang scaffolding. He then stated "that Local 79 was interested and going after the restoration work . . . and that they felt that the demolition was theirs, that the cleaning was theirs, blowing of brick and mixing of mortar was their work."

On June 13, Local 79's counsel sent to Jamie Rucker, a field agent for the Board's Region 2, a letter disclaiming interest in the work being done at the jobsite. The next day, Bitonti called Mastrione and informed him that DNA would not be signing a contract with Local 79 because of the disclaimer. Mastrione told Bitonti "that he [knew] nothing about the [disclaimer] letter being sent, and that [Bitonti] would find out how much interest [Mastrione] had in the project come Monday morning . . . [and] that [Bitonti] was making a mistake."

On Monday, June 17, Mastrione and Robinson spoke with Tajeri in the building's lobby. They said that DNA had not signed a contract with Local 79, and threatened that there would be picketing if the contract was not signed. That same day, Local 79 again displayed the rat at the site in the presence of Mastrione and Robinson. After June 17, Local 79 would intermittently put the rat up in the morning for a couple of hours and then take it down by lunchtime or 2 p.m. Bitonti last saw Local 79 picketers at the site on June 19, but he also testified that while on vacation he received reports of picketing by Local 79 after June 19.

B. Work in Dispute

The dispute concerns the assignment of demolition work, brick and window cleaning, and the cleaning of mortar droppings related to facade restoration at 150 West 51st Street, New York, New York.[5]

C. Contentions of the Parties

The Employer and Local 1 assert that Local 79's picketing and threats to picket had a jurisdictional objective because they were designed to force a change in the assignment of the work in dispute, thereby violating Section 8(b)(4)(D) of the Act. Both contend that the work in dispute should be awarded to employees represented by Local 1 based on the relevant factors discussed below. In addition, the Employer and Local 1 argue that the award should cover the entire New York City area because of Local 79's alleged past practice of unlawfully seeking to force DNA to reassign work.

Local 79 contends that the Board lacks jurisdiction in this case because there is no reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. It argues that its conduct had a representational rather than jurisdictional objective and that in any event, it twice disclaimed interest in the work in dispute. Accordingly, Local 79 has moved to quash the notice of a 10(k) hearing.

DNA and Local 1 oppose the motion to quash. They argue that Local 79's first disclaimer is invalid because of post disclaimer threats and picketing by Mastrione, Robinson, and other members of Local 79, and that its second disclaimer, made at the hearing, is also invalid.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275* (*Lymo Construction Co.*), 334 NLRB 422, 423 (2001); *Teamsters Local 259* (*Globe Newspaper Co.*), 327 NLRB 619, 622 (1999); *Laborers Local 113* (*Super Excavators*), 327 NLRB 113, 114 (1998). We find that all these conditions have been met.

1. There are competing claims to the work

Local 79 has repeatedly claimed the disputed work and demanded that DNA sign a contract. For example, on June 10, Mastrione claimed that Local 79 was interested in the restoration work and insisted that the "demolition was theirs, that the cleaning was theirs, blowing of brick and mixing of mortar was their work." Local 1 also explicitly claimed the work at the hearing and in its briefs.[6]

We reject Local 79's assertion that it has effectively disclaimed the work. To be effective, a disclaimer must be a clear, unequivocal, and an unqualified disclaimer of all interest in the work in question. *Operating Engineers Local 150* (*Interior Development*), 308 NLRB 1005, 1006 (1992). Conduct inconsistent with a disclaimer militates against its effectiveness. Thus, an otherwise clear and unequivocal disclaimer may be rendered ineffective by subsequent union conduct manifesting a continuing jurisdictional claim. *Operating Engineers Local 542* (*James Julian, Inc.*), 247 NLRB 1113, 1115 (1980); cf. *Laborers District Council of Baltimore* (*Potts &*

[5] The work entails the cutting of brick and its replacement, corner reconstruction, lintel replacement, waterproofing of steel underskins, steel replacement, parapet replacement, caulking, pointing, roof replacement, scaffolding erection, and general cleanup.

[6] In any event, members of Local 1 are already performing the disputed work. The performance of work by a group of employees is evidence of a claim for the work by those employees, even absent a specific claim. *J.P. Patti Co.*, 332 NLRB 832 at fn. 6 (2000).

Callahan), 265 NLRB 628, 629 (1982). Such is the case here.

Although Local 79's June 13 disclaimer was not equivocal on its face, we find that it was nullified by Local 79's post disclaimer conduct. DNA's witnesses testified, without contradiction, that Mastrione and Robinson made threats and, with others, picketed the jobsite after the June 13 disclaimer. These post disclaimer activities at the site invalidated the June 13 disclaimer. *Operating Engineers Local 524*, supra; *Bricklayers Local 2* (*Decora Inc.*), 152 NLRB 278 (1965).

We also find that Local 79's second disclaimer, made at the hearing, was materially undermined by the invalidity of the June 13 disclaimer. *Operating Engineers Local 825* (*Harms Construction*), 273 NLRB 833, 835–836 (1984). Accordingly, we reject Local 79's contention that it effectively disclaimed interest in the disputed work.

2. There is reasonable cause to believe that Section 8(b)(4)(D) has been violated

a. The dispute is jurisdictional

A dispute within the meaning of Section 8(b)(4)(D) requires a choice between two competing groups: "There must, in short, be either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group." *Laborers Local 1* (*DEL Construction*), 285 NLRB 593, 595 (1987), quoting *Food & Commercial Workers Local 1222* (*FedMart Stores*), 262 NLRB 817, 819 (1982).

DNA and Local 1 contend that this dispute is jurisdictional because it is over which of two groups of workers—members of Local 1 or members of Local 79—should be performing the disputed work. Local 79 counters that the dispute is over which union should represent the workers currently employed by DNA, not over which group of employees should perform the disputed work, and thus is representational and not jurisdictional. In this regard, Local 79 relies on *Carpenters Local 275* (*Lymo Construction Co.*), supra.

We agree with the Employer and Local 1 that the dispute is jurisdictional. Local 79 expressly claimed the disputed work as "its work." It also demanded that DNA sign a contract, even though employees represented by Local 1 were already performing the work under a collective-bargaining agreement between DNA and Local 1. The contract that Local 79 wanted DNA to sign contained a union-security clause requiring all employees performing covered work to be members of Local 79 as a condition of employment. Had DNA signed that contract, Local 79 could have insisted that DNA fire any current employees who resisted joining Local 79, thus effectively taking the disputed work away from employees represented by Local 1 and giving it to employees represented by Local 79. In nearly identical circumstances, the Board has found disputes to be jurisdictional, even though the unions attempting to acquire the disputed work framed their demands in representational terms. *Parkersburg Building Trades Council*, 119 NLRB 1384 (1958);[7] *Hod Carriers' Local 1149 (Lang Bros.)*, 125 NLRB 753 (1959). In those cases, the Board found disputes to be jurisdictional where unions sought to perform work under union-security contracts and other unions were already performing the work under contract.

Lymo Construction, cited by Local 79, is distinguishable. In that case, employees represented by the Sheet Metal Workers began performing roofing work under a collective-bargaining agreement. Soon after, the Carpenters claimed the metal siding work at the site. Although both unions continued to claim the metal siding work, the employer executed a contract with the Carpenters, and then used a composite crew from both unions at the site until the completion of the job. Neither union objected to the performance of the metal siding work by the employer's current employees. The Board found that dispute to be representational because it was over which union would represent the single group of employees currently performing the metal siding work. 334 NLRB at 424.

By contrast, this is not a dispute about which of two competing unions will represent a single group of workers currently performing work. Local 79 wants its members to replace those currently doing the work at the site. Mastrione explicitly told Bitonti that the disputed work belonged to Local 79. Thus, unlike *Lymo Construction*, this case involves an attempt by one group of employees to take a work assignment away from another group of employees. For that reason, this dispute is jurisdictional, not representational.

b. Local 79 used proscribed means to enforce its claim to the disputed work

As discussed above, Local 79 repeatedly picketed and threatened to picket in support of its demand for the dis-

[7] Member Schaumber agrees that Local 79's contention that the dispute in this case was solely representational must be rejected. In addition, however, he wishes to point out that Local 79's assertion that the dispute "was over which union should represent the workers employed by DNA, the Bricklayers or Local 79" raises a different set of concerns. If Local 79 had indeed signed a collective-bargaining agreement with DNA covering the very unit employees already represented by Local 1, thus resulting in DNA repudiating its agreement with Local 1, a question would be raised as to whether both DNA and Local 79 had violated the Act. See *Finix & Scisson, Inc.*, 207 NLRB 752 (1973), enfd. mem. 506 F.2d 1404 (7th Cir. 1974).

puted work. Thus, we find that Local 79 used proscribed means to enforce its claim to the work.

3. There is no agreed-upon method for the voluntary adjustment of the dispute

There is no agreed-upon method that would bind all of the parties to a voluntary adjustment of the dispute.

Because there are competing claims to the work, there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and the parties have not agreed on a method for the voluntary adjustment of the dispute, we find that this dispute is properly before the Board for determination. Therefore, Local 79's motion to quash the notice of 10(k) hearing is denied.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212* (*Columbia Broadcasting*), 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743* (*J.A. Jones Construction*), 135 NLRB 1402, 1410 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements

Local 79 has never had a collective-bargaining agreement with the Employer. By contrast, DNA has had a series of collective-bargaining agreements with Local 1 since 1995, when DNA began its operations. The most current agreement is through the Building Restoration Contractors Association, Inc. (BRCA), an employer association of which DNA is a member. The Pointers, Cleaners & Caulkers Collective-Bargaining Agreement between Local 1 and the BRCA provides that the contract encompasses:

> work done on the exteriors and/or interiors of buildings and masonry structures, using all equipment to complete the task including the following: pointing, cleaning, caulking, repairing, cutting, patching, reinstalling of replacement materials, waterproofing, reconstructing, renovation and restoration of masonry, using rigging, steam jennys and air compressors, and related power tools and hand tools, . . . swing scaffolds and scaffolding, the rigging and assembling of suspension systems, the use of welding and cutting equipment . . . .

Accordingly, this factor favors awarding the work in dispute to the employees represented by Local 1.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by Local 1 and prefers that it continue to be performed by those employees. This factor favors awarding the disputed work to employees represented by Local 1.

3. Employer's past practice

The record shows that the Employer has assigned work similar to the disputed work to crews composed of employees represented by Local 1 at other projects in New York City since July 1, 1997. Accordingly, this factor favors an award of the disputed work to the employees represented by Local 1.

4. Area and industry practice

The area and industry practice has not been demonstrated. No evidence was offered concerning the practices of any employer other than DNA. We find that this factor does not favor either group of employees.

5. Relative skills and training

Both the Employer and Local 1 argue that DNA's project is a standard restoration job involving brick removal and replacement, waterproofing, steel work and demolition work, which Local 1 tradesmen are particularly trained and skilled to perform. Both provided testimony that all Local 1 members working for DNA undergo a four-year apprenticeship program covering all aspects of the trade, including waterproofing. Local 79 offered no evidence regarding its members' training or skills. We find that this factor favors an award of the disputed work to employees represented by Local 1.

6. Economy and efficiency of operations

The record reflects that it is more economical and efficient for the Employer to continue to use employees represented by Local 1 rather than employees represented by Local 79.

Local 1 and the Employer argue that on projects such as this, Local 1's members work as a self-contained unit without the help of other building trades. Members of Local 1 perform the entire spectrum of tasks at Local 1 worksites, from setup to cleanup. Bitonti testified that projects like this require teamwork, which Local 1 teams have developed through years of working together and knowing how the other members of the team perform their work. Local 79 gave no testimony on this issue.

The Employer and Local 1 also contend that members of Local 1 are trained, proficient, and experienced in the use of tools specific to the type of work being performed at this worksite, particularly dowel hammers and large and small hand-held grinders. The grinders, which have metal blades with diamond bits, are used to cutout the

mortar joints between the bricks. The dowel hammers are percussion, pneumatic electric hammers used to break out the bricks in the middle of the removed mortar. According to Bitonti's uncontroverted testimony, employees using the smaller hand-held grinders must carefully avoid chipping or damaging the brick face, while those using the large hand-held grinders must do isolated cutouts without disturbing the entire facade. Employees using the pneumatic hammers must use "a certain finesse" to avoid breaking out too much brick at one time. Using experienced Local 1 operators of these tools would avoid needless damages to the brick face. Moreover, mistakes by employees operating these tools could result in injuries or death to themselves and other employees and damage to the building and adjacent properties (for example cars parked below the scaffolding). Because of their experience with these tools, Local 1 members are less likely to make such mistakes. Local 79 provided no evidence related to the ability of its members to use these specialized tools efficiently and safely. Accordingly, we find that this factor favors an award of the disputed work to employees represented by Local 1.

Conclusion

After considering all the relevant factors, we conclude that DNA employees represented by Local 1 are entitled to perform the work in dispute. We reach this conclusion relying on the relevant collective-bargaining agreements, employer preference and current assignment, employer past practice, relative skills and training, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Local 1, not to that union or its members.

Scope of Award

Local 1 and DNA contend that a broad order covering all of New York City is necessary to avoid similar jurisdictional disputes in the future. We find no merit in that contention.

There are two requirements for a broad, area-wide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the charged party has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. *Bricklayers* (*Sesco, Inc.*), 303 NLRB 401, 403 (1991).

Neither Local 1 nor DNA introduced any testimony or evidence concerning either of these issues. On this record, the only other such dispute between Local 79 and Local 1 was in 1998 and ended with Local 79 disclaiming the work. The record thus does not support speculation by Local 1 and DNA that there is a strong likelihood of repetition. Accordingly, we shall limit the present determination to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of DNA Contracting, LLC, represented by Local 1, New York, International Union of Bricklayers and Allied Craftsmen, are entitled to perform demolition work, brick and window cleaning, and the cleaning of mortar droppings at the facade restoration project at 150 West 51st Street, New York, New York.

2. Local 79, Construction and General Building Laborers, LIUNA is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force DNA Contracting, LLC to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 79, Construction and General Building Laborers, LIUNA shall notify the Regional Director for Region 2 in writing whether it will refrain from forcing DNA Contracting, LLC, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.